SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, *Petitioners*,

v.

R. T. NORDWICK, Executor of the will and estate of ARTHUR L. NORDWICK, deceased, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 19, 1967.

OPINIONS BELOW

The opinion of the district court (R. 63-80) is not reported.[1] The opinion of the court below (Appendix A, *infra*, pp. A1-A10) has not yet been reported.

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[1] "R." refers to the unprinted record used below, the pagination of which, however, does not include the separately bound exhibits, Pet. Ex. 1-63 and Resp. Ex. 64-65. All those exhibits will be cited simply by number; those offered by petitioners are listed at R. 19-25.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A11) was entered on May 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether administrative practice on the part of the General Land Office that construed an Indian statute to the detriment of an Indian tribe is sufficient in any circumstances to deprive such tribe of valuable oil and gas interests, in the absence of any showing that such administrative practice was concurred in or even brought to the attention of the Bureau of Indian Affairs.

2. In 1935, an entryman was issued a patent for land that contained a reservation of oil and gas to certain Indian tribes. Twenty years later, in 1955, the Bureau of Land Management issued to this same entryman a supplemental patent for the previously reserved oil and gas, without notice to the Indian tribes thereby divested, in the face of rulings by two legal officers of the Interior Department that the oil and gas belonged to the Indian tribes, and so swiftly that the Indian tribes affected could neither intervene nor appeal to the Secretary. In an action by the Indian tribes against the entryman to compel reconveyance of the oil and gas interests, the district court held the supplemental patent invalid as to one-third of the acreage involved, and the entryman did not appeal. The validity of the balance of the supplemental patent was sustained both by the district court and the court of appeals, in the latter tribunal despite the representation of the United States, made at the request of that court, that the supplemental patent divesting the Indian tribes of oil and gas had been illegally issued.

The question presented is whether the court below correctly held that the issuance of the remaining two-thirds of the supplemental patent in those circumstances can be

sustained on the basis of a showing of administrative practice by the General Land Office in respect of not reserving oil and gas to the Indian tribes.

3. The Fort Peck Indian Reservation Act of March 3, 1927, c. 376, 44 Stat. 1401, reserves to the Indian tribes living there the oil and gas underlying tribal lands that are "undisposed of" on the date of its enactment. The question presented is whether land is "undisposed of" within the meaning of that Act where, prior to its date, the land had been entered, but the entryman did not until after the date of the Act fulfill the statutory conditions of settlement, cultivation, or payment, all of which were requisite to his entitlement to a patent.

STATUTES INVOLVED

The provisions of the statutes involved are set forth in Appendix C, *infra*, pp. A11-A15.

STATEMENT

A. The Basic Statutes

In 1888, the Fort Peck Indian Reservation was carved out of a larger reservation that Congress had established in 1874. Act of May 1, 1888, c. 213, 25 Stat. 113, 116; Act of April 15, 1874, c. 96, 18 Stat. 28. All of the land within the Fort Peck Indian Reservation was tribal. Then, in 1908, Congress directed that a portion of the tribal land be allotted in severalty, and that the remainder, referred to a "surplus" or as "ceded in trust" land, be appraised and "disposed of under the general provisions of the homestead, desert-land, mineral, and town-site laws of the United States" for the appraised value, but not less than $1.25 per acre. Section 7 of the Act of May 30, 1908, c. 237, 35 Stat. 558, 561, *infra*, pp. A11-A12.

Section 8 of the 1908 Act (35 Stat. at 561-562) provided that "when an entryman shall have complied with

all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered." *Infra*, p. A13. Section 13 of the 1908 Act (35 Stat. at 563) further required "that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof * * *." *Infra*, p. A14.

In the 1920's, the Fort Peck Indian Reservation came to be considered valuable for oil and gas, but neither the 1908 Act nor any other statute then provided for oil and gas leasing of "surplus" or "ceded in trust" Indian lands.[2] Accordingly, the 1908 Act was amended by the Act of March 3, 1927, c. 376, 44 Stat. 1401 (*infra*, pp. A14-A15), "by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act," and by authorizing oil and gas leasing by the "tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe." *Infra*. p. A15.

B. Nordwick's Entries and the Leasing of the Reserved Oil and Gas

Arthur L. Nordwick, respondents' predecessor in title (hereinafter "Nordwick"),[3] filed a homestead application

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[2] The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*, did not apply to Indian lands, see *Haley* v. *Seaton*, 281 F. 2d 620, 623 (D.C. Cir.), while the existing statutes for leasing oil and gas on unallotted Indian lands were applicable only to treaty reservations (Act of May 29, 1924, c. 210, 43 Stat. 244; 25 U.S.C. § 398) and to executive order reservations (Act of Mar. 3, 1927, c. 299, 44 Stat. 1347; 25 U.S.C. § 398(a)). The Fort Peck Indian Reservation, as has been seen, was created by statute.

[3] Nordwick died during the pendency of the action, after which his executor and devisees, the present respondents, were substituted as parties in his stead (R. 87).

for the single tract of land now involved, containing 160 acres (NW ¼, Sec. 34), on January 24, 1925 (Pet. Ex. 1). To quote the court below (*infra*, p. A2), "When the 1927 Act was passed, Nordwick had paid only one fifth of the purchase price, had not satisfied the statutory cultivation requirements (43 U.S.C. § 218(d)), and had not submitted the required final proofs (43 U.S.C. § 164)." He tendered final proof in 1929, which was conditionally accepted in 1930 subject to payment of the balance due, but the final certificate was not issued until such payment was made, in 1935 (Pet. Ex. 19-21, 31, 51, 64). A patent issued on December 13, 1935, with a reservation of oil and gas under the 1927 Act (Pet. Ex. 53; Pretrial Order, ¶ IV-3, R. 30).

On May 25, 1929, after the 1927 Act, Nordwick filed a second homestead application for an 80-acre tract (W ½ NE ¼, Sec. 34). This was rejected, subject to the applicant's consent to a reservation of oil and gas to the tribes, consent which was then given (Pet. Ex. 7, 9, 11). Proof was made and accepted and final certificate issued as in the case of the larger tract (Pet. Ex. 22-24, 31, 51, 64), and the same patent that issued in 1935 with the oil and gas reservation already mentioned covered the entire 240 acres comprised in both tracts (Pet. Ex. 53; Pretrial Order, ¶ IV-3, R. 30).

Twenty years after Nordwick received his patent that reserved oil and gas to the petitioner tribes, the tribal oil and gas underlying his land was offered at a Bureau of Indian Affairs lease sale held at the Fort Peck Agency on September 2, 1955, pursuant to the Indian Mineral Leasing Act of May 11, 1938, c. 198, 52 Stat. 347 (25 U.S.C. §§ 396a *et seq.*). On September 5, 1955, Carter Oil Company entered the high bid (Pet. Ex. 63, pp. 40-45), which was accepted by the Tribes (Pretrial order, ¶ V-1-5c; R. 31), with the result that a lease was executed by Carter Oil and the Tribes (Pet. Ex. 54, 1st ¶; Pet. Ex. 59).

C. Conveyance of the Tribes' Reserved Oil and Gas Without Notice to Them

Following the tribal sale, Carter Oil on November 15, 1955, acquired from Nordwick a quitclaim oil and gas lease to the 240 acres (Resp. Ex. 65), after which Carter Oil advised the Bureau of Indian Affairs on December 9, 1955, that it had investigated the title and had concluded that Nordwick owned the oil and gas (Pet. Ex. 54).

Four days later, Nordwick requested the Secretary of the Interior to issue him a corrected patent eliminating the oil and gas reservation (Pet. Ex. 55); this was 20 years to the day after the date of the original patent (Pet. Ex. 53). The Field Solicitor of the Department ruled that title to the oil and gas was in the Tribes, and that Carter Oil was not entitled to have its lease with the Tribes rescinded (Pet. Ex. 56, 57). On March 23, 1956, Assistant Solicitor Bradshaw in the Department at Washington ruled, in a memorandum citing authorities, that the lands in question were "undisposed of" on the date and within the meaning of the 1927 Act; accordingly, he refused to indorse a "draft decision" of the Bureau of Land Management which undertook to hold that Nordwick was entitled to the oil and gas (Pet. Ex. 60).

The "draft decision" appears to be the same as the final decision of May 4, 1956 (Pet. Ex. 61). That final decision was indorsed "Bradshaw 4/17" (Pet. Ex. 61), but the files of the Department are silent regarding the reasons for Assistant Solicitor Bradshaw's change of view between March 23 and April 17 of the same year. At any rate, the Bureau's final decision granted Nordwick a supplemental patent eliminating the reservation of oil and gas under the 1927 Act (Pet. Ex. 61), and five days later, on May 9, 1956, such a supplemental patent duly issued, reciting that the patent of 1935 had erroneously included a reservation of oil and gas (Pet. Ex. 62).

At no time prior to the issuance of the supplemental patent was any notice or opportunity given the Tribes to present their views, or to defend the Tribes' title, or to participate in the proceedings that culminated in the issuance of the supplemental patent to Nordwick. The *ex parte* procedure thus followed by the Bureau of Land Management disregarded the explicit earlier advice of the Field Solicitor that the Tribes should be notified and given an opportunity to be heard (Pet. Ex. 56; Dist. Ct. Op., R. 67 n. 2).

When the matter finally did come to the Tribes' attention, they appealed to the Secretary on April 11, 1957 (R. 67). No decision was forthcoming, and the present action was brought on July 24, 1963 (R. 1). Thereafter, following oral argument of the present cause in the district court, the Tribes' appeal to the Secretary was dismissed on the footing that, since the supplemental patent had already issued, the Department was without jurisdiction to hear the appeal (R. 58-62; R. 67 and n. 3).

D. Proceedings in the District Court

This action was brought by the Tribes against Nordwick seeking a judgment that the Tribes are the beneficial owners of the oil and gas underlying the 240 acres conveyed by the patent and supplemental patent (R. 4); for a judgment that Nordwick convey such oil and gas to the Tribes (R. 4); and for money damages (¶ 3, R. 55-56).

The district court held, as to the 160-acre tract, that the words "undisposed of" in the 1927 Act would not include lands where an entry had been made before the date of the 1927 Act even though none of the statutory requirements for a patent had been satisfied, and accordingly ruled in Nordwick's favor in respect thereof (R. 68-74, 79). As to the 80-acre tract, however, the district court ruled that since Nordwick's entry was made after the date of the 1927 Act, the land was "undisposed of"

on that date, with the result that the oil and gas underlying the smaller tract belonged to the Tribes (R. 74-75, 80).

Following substitution of the present respondents in consequence of Nordwick's death (R. 87), judgment was entered accordingly (R. 88-89).

The Tribes appealed from the judgment adverse to them as to the 160-acre tract (R. 90); the respondents acquiesced in the judgment adverse to Nordwick in respect of the 80-acre tract, a judgment that has long since become final.

E. Proceedings in the Court Below: Views of the United States There Expressed at Court's Request

On July 7, 1966, two days after the Tribes' appeal was argued in the court below, that tribunal requested the views of the United States regarding the proper construction of the 1927 Act as applied to the present case.[4]

The United States filed a brief setting forth its view that the ruling of the district court "was erroneous." It attached to its brief a copy of Assistant Solicitor Bradshaw's memorandum of March 23, 1956 (Pet. Ex. 60), which set forth reasons and authorities why Nordwick's land was "undisposed of" when the 1927 Act became law. It also attached to its brief a letter from the Solicitor of the Department of the Interior, dated July 27, 1966, which concurred in the original Bradshaw view, citing cases. And the United States' brief further called attention to the rule that doubtful expressions in Federal legislation dealing with Indians must be resolved in their favor, citing

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[4] Oral argument was had on July 5, 1966 (R. 103). The order entered on July 7 was as follows: "The Solicitor General is requested to submit his views with respect to the proper construction of the Act of March 3, 1927, see chapter 376, 44 Stat. 1401, as applied to this case, within sixty days of the date hereof, the cause then to be submitted."

Maryland Cas. Co. v. *Citizens Nat. Bank of West Hollywood*, 361 F. 2d 517 (C.A. 5).

Nonetheless, the court below, without once mentioning the views of the United States that the court had solicited, decided the case on May 19, 1967, against the Tribes. After reciting considerations *pro* and *con*, after saying that (*infra*, p. A9) "It would be idle to pretend that the choice between these conflicting indicia of congressional intent is clear; and regrettably, in this instance Congress cannot readily correct us if we err", the court below concluded (*infra*, p. A9) that "The consideration we find compelling in favor of the entrymen in this case is the virtually unbroken administrative practice of issuing patents on pre-1927 homestead applications after passage of the 1927 Act without reserving oil and gas rights."

This rested on a submission by Nordwick in opposition to the Memorandum for the United States, viz. (*infra*, p. A7), "A partial survey of Land Office records, submitted to this court by Nordwick and unchallenged by the Tribes, discloses 157 patents issued after 1927 on homestead entries predating the 1927 Act which do not contain a reservation of oil and gas deposits."

REASONS FOR GRANTING THE WRIT

This case presents a particularly crass instance of the spoliation of Indian rights, one effected by means of a shocking administrative irregularity that the court below only footnoted, but which effectively deprived the Indians of every opportunity to be heard before they were divested of valuable oil and gas deposits by *ex parte* action. The decision now sought to be reviewed, which upholds the validity of the action thus taken, is contrary to the views of the United States, which the court below solicited—but then did not even mention in its opinion. And that decision, which is admittedly beyond the power of Congress to correct, was deemed impelled by the single factor found

controlling by the court below, namely, a presentation of administrative practice.

But, for reasons about to be developed, the factor of administrative practice is quite inadequate to support the result reached below, first because there was no consistent practice in this very case, second because the doctrine that gives controlling weight to administrative practice is necessarily inapplicable where a statute dealing with Indians has been construed by a bureau not charged with responsibility for Indian affairs.

First. The record in this case plainly demonstrates that there has been no uniformity in respect of the patent now in issue. As has been shown (*supra,* page 6), the Field Solicitor originally ruled that the Tribes owned the oil and gas (Pet. Ex. 56, 57), and so did Assistant Solicitor Bradshaw in the Department (Pet. Ex. 60). Less than a month later, the latter changed his position (Pet. Ex. 61), but while this case was *sub judice* in the court below, the United States at that court's request took the position that the Tribes did indeed own the oil and gas, and presented a communication from the Solicitor of the Department in support of that view.

Thus, in respect of the very patent in suit, the only consistency within the Department has been its inconsistency. It is true that the score in favor of these Indians was three to one—the Field Solicitor, Bradshaw the first time, and the Solicitor, for the Indians; and only Bradshaw the second time against them—but unhappily for the Tribes the patent divesting them of their property was issued on the strength of the minority ruling last mentioned.

Moreover, though it nowhere appears from the opinion below, there has been a further and striking inconsistency in this very litigation.

The patent sought to be cancelled (Pet. Ex. 62) conveyed to Nordwick the oil and gas underlying 240 acres. The

district court cancelled the patent as to 80 acres and directed reconveyance (R. 88-89); Nordwick did not appeal, and that part of the judgment has become final. It is only the balance of 160 acres purporting to have been conveyed by the identical patent that has been adjudged to Nordwick. Thus the judgment now in force actually splits the patent presently in issue.

Accordingly, this case is governed by a line of decisions here that the court below completely overlooked, decisions holding that, where the administrative practice has been inconsistent and not uniform, it is unpersuasive and hence cannot be given weight. *Merritt* v. *Cameron*, 137 U.S. 542, 552; *United States* v. *Healey*, 160 U.S. 136, 145; *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 280; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16; *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 500; *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 332, 334; cf. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140.

A practice as inconsistent as that shown here could not be made the basis for mandamus on the footing that the Secretary's duty was simply ministerial. See *Wilbur* v. *United States*, 281 U.S. 206.

It follows that to rely on administrative practice to overcome the irregularities disclosed by the present record, as the court below indeed did, is to disregard the unbroken teachings of this Court in a vital area and in a constantly recurring context.

Second. But even a uniform course of administrative action could still not be of controlling weight here, because, in two respects, it was not adversary. See *Fishgold* v. *Sullivan Drydock Corp.*, 328 U.S. 275, 290.

A. First and foremost, it is wholly unrealistic to consider that Indian rights are to be measured by the action of officials who are not charged with protection of the Indians. Not only is it the fact that the General Land Office and

its successor the Bureau of Land Management have always operated independently, in virtual isolation from the Bureau of Indian Affairs, joined only by the fragile nexus of the Secretary of the Interior's supervision, but their functions are and have been quite different, particularly during the critical period involved here. The General Land Office existed to give land away, the Bureau of Indian Affairs to protect and preserve such lands as the Indians still had left.

It would indeed be a most flagrant distortion of the doctrine of administrative practice, i.e., that special weight is to be accorded the acts of those charged with the execution of a particular statute, to hold, as the court below actually held, that what the General Land Office did over a period of years, *ex parte,* without hearing the views of those responsible for the protection of Indian rights, and in the absence of any decision at the Secretarial level, is to be given the effect of irrevocably limiting—here of destroying—Indian rights.

B. Specifically, the patent in suit, which divested the petitioner Tribes of their oil and gas 20 years after an earlier patent had reserved it to them, was issued without notice to them, without any opportunity whatsoever to be heard, and so swiftly that the only right of appeal available to them was actually cut off by the very act of which they now complain.

The Field Solicitor had specifically recommended that (Pet. Ex. 56, p. 2), "Since it is obvious that a property right of the Fort Peck Tribe is challenged, the Tribe should be notified of the raising of this question and given opportunity to be represented by its own counsel." That advice was ignored, two legal opinions favorable to the Tribes were also ignored, and the patent conveying away the Tribes' oil and gas was issued five days after the *ex parte* decision against them. Consequently, as the event

proved, they could neither intervene nor appeal (R. 58-62; R. 67 and n. 3).

Reliance even on uniform administrative practice in those circumstances adds up simply to legalizing a back-door taking.

Third. With the sole exception of the ruling now sought to be reviewed, every single decision on the substantive question is unanimous the other way. As the Solicitor of the Department of the Interior said, in the letter presented to the court below by the United States, "The published decisions of this Department over the past sixty years have time and again stated the position that lands entered under the homestead laws and similar laws may be withdrawn by the United States for any of several purposes before all requirements leading to the issuance of a patent have been satisfied. Similarly, before an entry has been perfected by performance of the entryman of all that he is required to do for a patent, the United States may reserve unto itself the mineral rights therein or require a waiver of the same under pain of cancellation of the entry. See *Mary C. Sands,* 34 L.D. 653 (1906); *Instructions,* 43 L.D. 294 (1914); *Cleveland Johnson (On Rehearing),* 48 L.D. 18 (1921); *Columbus C. Mabry (On Rehearing),* 48 L.D. 280 (1921); *Lee O. LaFlame,* 49 L.D. 324 (1922); *Arsene J. Martin,* 49 L.D. 608 (1923); *Jacob Terrell,* 49 L.D. 671 (1923)."

The courts, too, had up to now uniformly held that an entryman such as Nordwick does not earn his right to legal title until he has done all that the law requires of him, so that, at any time prior to that point, his inchoate rights may be withheld from him by Congress. *Wyoming* v. *United States,* 225 U.S. 489, 497-498, 501-502, *Shiver* v. *United States,* 159 U.S. 491, 497; *Yosemite Valley Case,* 15 Wall. 77, 87-88; *Wilbur* v. *United States,* 53 F. 2d 717, 720 (D.C. Cir.), certiorari denied, 284 U.S. 687. And, as

the United States represented to the court below (Memorandum, p. 3), "No reason appears why Congress should be considered to have exercised less than all of the authority it possessed to reserve minerals for the Indian Tribes."

Fourth. The present case deals only with the oil and gas underlying 160 acres. The ultimate decision herein will affect the oil and gas underlying perhaps 200,000 acres, and hence the property rights of the petitioner Tribes who number some 6000 persons—not a great deal of property, true enough, nor many persons, in the context of today's opulence and today's national population of nearly 200,000,000.

Actually, however, far more is involved. This case concerns the fiduciary obligations of the United States and its good faith as trustee of its Indian wards. Congress expressly provided in 1908 "that the United States shall act as trustee for said Indians to dispose of said lands" (Sec. 13, *infra,* p. A14). And this Court has many times said that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw,* 280 U.S. 363, 367, quoted in *Squire* v. *Capoeman,* 351 U.S. 1, 6-7.

If the decision below is permitted to stand, then the back-door divestiture of these Tribes' oil and gas, reflected by the present record, which, as has been seen, was effected without notice to them, and with such unusual and indeed indecent haste that their right to be heard by their statutory guardian was irrevocably cut off, will have received judicial sanction, admittedly beyond hope of Congressional rectification.

Such a result, assuredly, would be "a sorry breach of faith with these Indians." *Squire* v. *Capoeman,* 351 U.S. 1, 10. Only this Court now has the power to avert the wrong that impends.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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